In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

STATUTES INVOLVED

The statutes involved are sections 4, 4B, 5(i), 11(a) and 16 of the Clayton Act, 15 U.S.C. §§ 15, 15b, 16(i), 21(a) and 26 and Section 5(10) of the Interstate Commerce Act, 49 U.S.C. § 5(10). Petitioners have set forth Clayton Act §§ 4B and 5(i) in the Appendix to their brief. Sections 4, 11(a) and 16 of the Clayton Act and Section 5(10) of the Interstate Commerce Act are set forth in Appendix A hereto.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's decision that the statute of limitations was tolled pursuant to 15 U.S.C. § 16(i) when the United States, acting through the Justice Department (Antitrust Division), intervened as a party to ICC proceedings commenced by Mt. Hood under 49 U.S.C. § 5(10) [formerly § 5(9)] and thereafter prosecuted those proceedings with Mt. Hood for the purpose of preventing Greyhound's destructive competition in violation of the antitrust laws.

2. Whether the statute of limitations was also tolled pursuant to the doctrine of equitable tolling when Mt. Hood commenced the ICC action for the purpose of (a) preventing Greyhound's predatory conduct and (b) invoking the ICC's primary jurisdiction to determine whether Greyhound's predatory conduct was approved and therefore exempt from the antitrust laws or was disapproved and therefore subject to the antitrust laws.[1]

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[1]The Court of Appeals affirmed the District Court's decision as to §16(i) tolling and therefore declared, "We need not reach Mt. Hood's contention that the statute of limitations was tolled on December 14, 1960 [sic] by virtue of Mt. Hood's commencement of the Section 5(9) proceedings". (A. 137) The Supreme Court may affirm a judgment upon any grounds, regardless of whether the grounds were considered by the courts below. *Scheik v. Alberto Culver Co.*, 417 U.S. 506, 525 (1974) (dissent); *Walling v. General Industries Co.*, 330 U.S. 545, 547 n. 5 (1947); *Public Service Commissioner of Puerto Rico v. Havemeyer*, 296 U.S. 506, 509 (1936); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); *United States v. American Railway Express*, 265 U.S. 425, 435-36 (1924).

STATEMENT OF THE CASE

Mt. Hood Stages, Inc. ("Mt. Hood") and Greyhound Lines, Inc. are motor carriers of passengers and express, subject to regulation by the Interstate Commerce Commission ("ICC"). Greyhound Lines, Inc. ("Greyhound") is wholly owned by The Greyhound Corporation. Greyhound operates routes throughout the United States; it controls over 80% of all intercity bus traffic in the 11 Western states (Ex. 428-A); and its route authority surrounds that of Mt. Hood. (Ex. 471-A) Because Mt. Hood's "bridge" routes between several cities in Oregon, Idaho and Utah are more direct than Greyhound's routes, Mt. Hood is able to provide faster service than Greyhound to passengers moving between those cities. (Ex. 471-A; A. 22)

During 1947-1954, Greyhound embarked upon a program to acquire control of eight independent bus companies which operated in the Pacific Northwest and whose routes connected with Mt. Hood's routes. (A. 110; R. 1844, *et seq.*) Mt. Hood was concerned that once Greyhound completed its encirclement of Mt. Hood by acquiring those independent carriers, Greyhound might proceed to "longhaul" passengers over its circuitous routes and disrupt connections with Mt. Hood so as to destroy Mt. Hood's direct service. (Tr. 3410) Mt. Hood therefore protested most of those acquisitions. (A. 110) At the acquisition hearings, Greyhound repeatedly assured the ICC and Mt. Hood—under oath—that it would not engage in destructive practices toward Mt. Hood if the acquisitions were approved. (*Mt. Hood Stages, Inc.*, 104 MCC 449 (1968); A. 110-12) Both Mt. Hood and the ICC relied upon Greyhound's

sworn assurances and the ICC, basing its decisions thereon, approved the acquisitions. Neither Mt. Hood nor the ICC discovered until many years later that Greyhound's representations were false and that Greyhound had been consistently and covertly longhauling passengers around Mt. Hood from the beginning. (*Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63 (1968); A. 110-12)

On July 6, 1964, Greyhound broke connections and cancelled joint through bus service with Mt. Hood. Because Mt. Hood was then surrounded by Greyhound and thus substantially dependent upon Greyhound for traffic, Greyhound's actions threatened grave harm to Mt. Hood's business. On October 7, 1964, after Greyhound had refused Mt. Hood's pleas to restore connections, Mt. Hood petitioned the ICC for relief. (A. 4) Just over 60 days later, on December 14, 1964, the Antitrust Division of the Justice Department petitioned to intervene as a party for the purpose of preventing Greyhound from engaging in predatory behavior which violated the antitrust laws. (A. 36)

Since its intervention, the Justice Department has vigorously prosecuted the ICC case with Mt. Hood. On April 5, 1968, the ICC (Division Three) affirmed the Hearing Examiner's report and found that Greyhound's practices constituted "destructive competition," were "not consistent with the public interest," were "inconsistent with their representations made in various Section 5 proceedings" and "were inspired by a desire to stifle competition" and "injure or destroy Mt. Hood." *Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63 (1968). The full panel of the ICC affirmed the Division Three order. (Exs. 426)

On July 5, 1968, promptly after the ICC's first decision, Mt. Hood commenced this action for damages. (A. 46) While Mt. Hood was prosecuting this action, Greyhound was resisting the ICC's cease and desist orders. The United States District Court in Chicago affirmed the ICC's orders and granted the government's request for an injunction prohibiting Greyhound from continuing its predatory behavior. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033 (N.D. Ill. 1970). Greyhound thereafter wilfully disobeyed the court injunction as well as the ICC orders. In June 1973, the District Court in Chicago found Greyhound guilty of criminal and civil contempt and imposed fines and probation. *United States v. The Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973). The District Court's judgment was affirmed by the Seventh Circuit. *United States v. The Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974). Two months before the contempt judgment, in May 1973, the jury in this action had found the same conduct violated §1 and §2 of the Sherman Act. (A. 82-3)

The jury also found Greyhound had fraudulently concealed its antitrust violations until July 4, 1964, but that Mt. Hood had notice of the fraudulently concealed violations on December 14, 1960.[2] It found that Mt. Hood sus-

[2]Greyhound implies the jury's verdict with respect to Mt. Hood's notice was fortuitous, i.e., that it was "coincidentally" just four years prior to the date of the government's intervention. There was nothing fortuitous about it. The jury found that Mt. Hood was put on notice on December 14, 1960 because the form of special verdict, requested by Greyhound over Mt. Hood's objection, required the jury to pick a specific date. (Tr. 6093-7) Since the jury was given the difficult task of picking a specific date on which Mt. Hood discovered Greyhound's antitrust violations, it selected the most conservative date under the Court's instructons on § 16(i) tolling—December 14, 1960.

tained $1,105,057 damages from January 1, 1953, to December 15, 1960, and that Mt. Hood sustained $626,482 damages from December 15, 1960, to July 5, 1964. (A. 82-3) The courts below held the statute of limitations was tolled for the period 1953-60 by reason of fraudulent concealment and for the period 1960-64 by reason of 15 U.S.C. §16(i).

SUMMARY OF ARGUMENT

The Court of Appeals' decision holding the statute of limitations tolled under 15 U.S.C. §16(i) is consistent with both the language and purpose of that statute as construed by this Court. The ICC proceedings were jointly prosecuted by Mt. Hood and the Justice Department to prevent antitrust violations. The Justice Department's intervention therein was necessarily the functional equivalent of a direct court action and therefore constituted the institution of a government action to prevent violations of the antitrust laws. Mt Hood's later damage action was based upon matters "complained of in said proceeding," including matters about which the government had complained and sought to have enjoined. The Court of Appeals' decision was also consonant with the clear purpose of §16(i), as declared by this Court and several lower federal courts, to ensure antitrust victims the benefit of government antitrust enforcement efforts.

The Court of Appeals' affirmance of the District Court is further supported by the equitable doctrine of tolling, enunciated in prior decisions of this Court to prevent injustice. Tolling the statute of limitations while Mt. Hood necessarily sought preliminary assistance from the agency

having primary jurisdiction of the matters alleged and exclusive jurisdiction to grant Mt. Hood's request for injunctive relief promotes important federal policies expressed in the Clayton Act and the doctrine of primary jurisdiction, without frustrating the statute of limitations' policy of repose.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WAS IN ACCORDANCE WITH 15 U.S.C. §16(i)

The Court of Appeals affirmed the District Court's decision that, pursuant to 15 U.S.C. §16(i), the government's intervention and participation as a party to the ICC proceedings tolled the statute of limitations from December 14, 1964. Those decisions squared with both the language and the purpose of §16(i) as construed by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Greyhound's niggardly construction of §16(i) not only destroys the ordinary meaning of its language but also ignores this Court's plain holding in *Minnesota Mining:* The "pivotal question" to be answered is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." (381 U.S. at 321) Both courts below heeded that mandate. Circuit Judge Browning declared:

> "Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. [*Minnesota*

Mining] The clearly expressed purpose of §16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. [citation]. This purpose would be served by interpreting §16(i) to encompass the government's intervention and participation in the §5(9) proceedings before the Commission—a reading the language readily permits." (A. 132-3)

A. The ICC Action Was Prosecuted Jointly By The Government And Mt. Hood "To Prevent, Restrain Or Punish Violations . . . Of The Antitrust Laws" (15 U.S.C. §16(i))

Both courts below were correct in holding that the purpose of the ICC proceedings was to "prevent" or "restrain" violations of the antitrust laws within the purview of §16(i). That governmental action to prevent antitrust violations was taken before an administrative agency does not preclude the availability of §16(i). *Minnesota Mining*, supra. Nor is it necessary to §16(i) that the agency proceedings be commenced "under" the antitrust laws. *Rader v. Balfour*, 440 F.2d 469 (1971), *cert. denied*, 409 U.S. 983 (1971); *Luria Steel & Trading Corporation v. Ogden Corporation*, 484 F.2d 1016 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974). It is sufficient that governmental action was taken to prevent conduct which violates the antitrust laws or, as declared in *Rader*, that it was "directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws." (440 F.2d at 473)

The thrust of the ICC action, jointly prosecuted by the United States and Mt. Hood, was just that. Mt. Hood petitioned the ICC "for issuance of a general order which

will have the effect of prohibiting the discriminatory and destructive competitive practices hereinbefore described" (A. 34) and alleged that Greyhound's practices "represent in the aggregate a purpose on the part of Greyhound to . . . drive Mt. Hood out of business" (A. 31) and that "Greyhound's monopoly over most of the main routes in the Pacific Northwest gives it a traffic originating advantage which, if unrestrained and unfairly used, will enable it to starve out Mt. Hood." (A. 34)

The Court of Appeals properly held that "the government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct." (A. 135) Greyhound has even acknowledged that the Justice Department's intervention was "to assure the adequate consideration of the antitrust issues." (R. 1374; A. 136) There can be no question about this. The Justice Department declared that Greyhound's practices, as alleged, "have in the aggregate the appearance of a studied effort to force Mt. Hood out of business" (A. 37); that "the need for sharp surveillance of any abuse of the power these acquisitions have given Greyhound and for prompt action to correct any such abuse has become more important as Greyhound's encirclement of Mt. Hood has become more complete with each successive acquisition" (A. 39); that Mt. Hood "has necessarily become increasingly vulnerable to attack by Greyhound and increasingly dependent upon Greyhound for survival" (A. 39); and that "if the evidence supports Mt. Hood's other allegations of predatory conduct on the part of Greyhound it [the ICC] could conceivably save an independent carrier from extinction at the hands of an infi-

nitely more powerful rival." (A. 40) The government concluded:

> "Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not." (A. 40-41)

Hence is it plain enough that Mt. Hood and the Justice Department were seeking to "prevent . . . violations . . . of the antitrust laws." It is also plain that the ICC, in granting the cease and desist order sought by the parties, was enforcing the antitrust laws. The ICC declared that "the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding," *Mt. Hood Stages, Inc.*, 104 MCC 449, 451 (1968) and that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." (104 MCC at 458) The ICC found Greyhound's behavior "constitutes destructive competition in contravention of the national transportation policy." (104 MCC at 463) In affirming, the full panel of the ICC ordered Greyhound to cease and desist several practices which had been found to be "unreasonable and inconsistent with Greyhound's representations" to the ICC and "such other discriminatory and destructive practices which foreclose competitive and traffic patterns unreasonably and unnecessarily, without

regard for adverse effects on Mt. Hood." (Ex. 426) Affirming the ICC and finding Greyhound had engaged in "destructive competition", the District Court declared:

> "It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's duty to take the antitrust policy of the United States into account in its decision making." *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1038 (N.D. Ill. 1970).

In granting the injunctive relief sought by the Justice Department and Mt. Hood against Greyhound's "destructive practices", the ICC was acting in accordance with this Court's decisions which hold that the ICC has a duty to enforce the antirust laws. *Denver & R. G. W. R. Co. v. United States*, 387 U.S. 485 (1967); *see also, United States v. ICC*, 396 U.S. 491 (1970); *Port of Portland v. United States*, 408 U.S. 811 (1972); *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). Reversing a District Court affirmance of the ICC's refusal to consider antitrust issues presented by Greyhound's acquisition of stock of another carrier in another case, *Denver, supra*, this Court cited the ICC's "statutory obligations to protect the public interest and to enforce the antitrust laws." (387 U.S. at 498) The Court observed that the ICC is vested with the power under 15 U.S.C. §21 to enforce various provisions of the Clayton Act, including §7 (15 U.S.C. §18), whereas 15 U.S.C. §26 prohibits the antitrust victim from obtaining injunctive relief in a District Court against such violations. This restriction, the Court declared, "underscores

the ICC's responsibility to act when such violations are brought to its attention." (387 U.S. at 502)[3]

B. Civil Proceedings Were "Instituted By The United States" When the Justice Department, Acting On Behalf Of The United States, Intervened As A Party To The ICC Action

Both courts below also held that the Justice Department's intervention in the ICC case was the functional equivalent of a civil proceeding "instituted by the United States" within the purview of §16(i). That construction is consistent with the language of §16(i). There was no government "civil proceeding" prior to the Justice Department's intervention on behalf of the United States; there was thereafter. Government proceedings were therefore

[3]Greyhound implies that the ICC can only enforce the Clayton Act, not the Sherman Act, and that §16(i) is not applicable because Mt. Hood's damage action was brought under the Sherman Act. But the ICC's responsibility to consider the antitrust laws is not limited to the Clayton Act. This Court declared in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 761 (1973) that the ICC "is charged with responsibility for considering antitrust policy under its statute". Citing the *Denver* ruling for support, the Court observed in *Gulf States:* "[t]he fact that the ICC has a specific obligation under §11(a) of the Clayton Act, 15 U.S.C. §21(a), to enforce §7 of that Act, as well as a responsibility to advance the National Transportation Policy, did not control the decision in the *Denver case*". (411 U.S. at 761-2)

If the ICC had the power to disapprove acquisitions by virtue of §7 of the Clayton Act or to confer antitrust immunity by virtue of §5(12) [formerly §5(11)] of the Interstate Commerce Act, it certainly had the lesser power—exercised here—to condition its approvals by forbidding subsequent predatory conduct made possible by the previous acquisitions. It does not matter for tolling purposes whether the ICC was preventing violations of the Clayton Act or the Sherman Act when it ordered Greyhound to cease and desist its predatory behavior. Both are antitrust laws, within §16(i), and government proceedings to prevent violations of either toll the statute.

"instituted" by means of intervention in a pending ICC case.[4]

The lower courts' interpretation of §16(i) also effectuates congressional purpose as recognized by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), whereas a contrary interpretation would defeat it. The question decided in *Minnesota Mining* was whether FTC proceedings tolled the statute. It was held they did. Finding little help in the legislative history of §16(i), the Court declared:

> "It is in light of this legislative silence that we must determine whether §4B is tolled by Commission proceedings. In resolving this question we must necessarily rely on *the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions.*" (emphasis added) (381 U.S. at 320)

Defendant in *Minnesota Mining* sought and Greyhound here seeks to circumvent that congressional policy with essentially the same claim. Defendant in *Minnesota Mining* contended that §16(i) was not applicable because FTC proceedings, unlike Justice Department proceedings, are not "instituted by the United States". But the Court held "acceptance of petitioner's position would make enjoyment

[4]Greyhound contends that because the Justice Department's petition to intervene was filed on December 14, 1964 and the petition was granted on May 27, 1965, the government's intervention was untimely. For statute of limitation purposes, intervention must be deemed to occur on the date the petition is filed and not the date it is granted. *See, American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 561 (1974); *Bantolina v. Aloha Motors*, 75 F.R.D. 26, 33-34 (D.Ha., 1977); *Braxton v. Virginia Folding Box Co.*, 72 F.R.D. 124, 126 (E.D.Va., 1976); *S.E.C. v. Keller Bros. Securities*, 30 F.R.D 532, 533 (D.Mass., 1962).

of these intended benefits turn on the arbitrary allocation of enforcement responsibility between the Department and the Commission, and we must therefore reject it". (381 U.S. at 320)

Greyhound makes the same "arbitrary" claim here. If the Justice Department had filed its petition first and Mt. Hood had intervened promptly thereafter—instead of the reverse—there would be no question about the applicability of §16(i). Just as this Court properly held §16(i)'s availability should not depend upon the "arbitrary allocation of enforcement responsibility" between governmental agencies, the Court of Appeals properly held—in reliance upon *Minnesota Mining*—that it should not depend upon who reaches the ICC first.[5] Greyhound's contrary interpretation of §16(i) "would make form controlling" (A. 133) and is the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives". (381 U.S. at 320)

Greyhound's construction would not only defeat the congressional policy of the tolling statute, it would also make a mockery of the policy behind the limitations statute and would frustrate this Court's regard for judicial economy. Shortly after Greyhound terminated the joint through bus arrangement and severed connections with Mt. Hood's service, Mt. Hood proceeded to the ICC to

[5]In this respect, the present case is stronger than *Minnesota Mining* for it was the Justice Department that initiated action "by the United States" through intervention in the ICC case. Referring to the proceedings instituted by the FTC in *Minnesota Mining*, Justice Black (dissenting) observed that "it is not at all clear that this is a suit 'instituted by the United States'. The *Department of Justice* brings suits and criminal prosecutions in the name of the United States, while an independent regulatory agency sues and is sued in its own name". (emphasis added) (381 U.S. at 326, n. 2.)

seek injunctive relief in an effort to save its business from destruction. In seeking injunctive relief from the only forum available to it,[6] Mt. Hood acted with diligence. Just over 60 days later, the Government intervened. If the Government had chosen instead to commence a separate District Court action for injunctive relief against Greyhound's antitrust violations, it is beyond doubt the statute would have been tolled by §16(i). But it is equally plain that such a government-instituted court action, to enjoin the same predatory conduct which Mt. Hood's previously commenced ICC action sought to enjoin, would have been dismissed or stayed to prevent a conflict between court and agency, *Far East Conference v. United States*, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 473 (1932), and the Justice Department would have been remanded to the ICC where the issues were already being addressed.[7]

The government therefore entered a pending ICC case, plainly and necessarily the "functional equivalent" of a District Court action to achieve the same result. It was Mt. Hood's prompt commencement of an ICC action which rendered the government's intervention in that ICC action more appropriate than commencement of a separate court action. To deny tolling under those circumstances would be to invoke the limitations bar against Mt. Hood because

[6]15 U.S.C. §26.

[7]Cf. *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 185 (1962); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 392 (1973) (Stewart, J., dissenting): "Otter Tail's refusal to wholesale or wheel power . . . was the subject of two concurrent proceedings—one in the District Court, and another in the Federal Power Commission. It seems to me that the principles of *Ricci* . . . should require a District Court in a case like this one to defer to the Commission proceeding then in progress."

Mt. Hood was diligent. As the Court aptly declared in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965), the limitations statute's "policy of repose is frequently outweighed . . . where the interests of justice require vindication of plaintiff's rights." This was such a case.

C. Mt. Hood's Damage Action Was Based Upon Matters "Complained Of" In The ICC Proceeding

The Court of Appeals recognized that Mt. Hood's damage action was "based in whole or in part on . . . matters complained of in said [ICC] proceeding." (A. 111, 114, 131) Greyhound asserts the Justice Department petition had not "complained of" that conduct which was the subject of both the ICC proceeding and Mt. Hood's subsequent damage action. The Justice Department petition standing alone "complained of" the conduct alleged by Mt. Hood and asked that, if those charges are proven, Greyhound's conduct be enjoined. In prosecuting the ICC action with Mt. Hood, in seeking ICC cease and desist orders and a District Court injunction and in subsequently enforcing those ICC and court orders by prosecuting contempt petitions against Greyhound, the Justice Department plainly complained of that conduct which constitutes the gravamen of Mt. Hood's damage action. To assert the government did not complain of conduct which it strove to have enjoined offends common sense.

By focusing upon the government's petition to intervene, Greyhound disregards what the statute plainly says —tolling applies with respect to every court action that is based upon any matter "complained of" by the government "*in said proceeding.*" Thus the inquiry is not limited

to the petition itself—though the petition obviously complained about Greyhound's conduct—but necessarily includes the entire "proceeding" to which the government was a party. To assert otherwise is to give §16(i) the kind of "grudging interpretation" which this Court disapproved in *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Court in *Leh, supra,* held that "effect must be given to the broad terms of the statute" (382 U.S. at 59) and, as a consequence, rejected defendant's contention that a "private claimant may invoke §16 (i) only if the conspiracy of which he complains has the same breadth and scope" as that alleged in the prior government action. (382 U.S. at 63) Defendant in *Zenith, supra,* argued that since it was not even mentioned in the Government complaint as a defendant or an unindicted co-conspirator, the private suit against it was not based upon any matter "complained of" in the prior government action. But the Court did not look to the pleadings alone. It held that if the Government "complains" only against certain defendants but "*alleges and proves during trial* that others were conspirators, the fact of the tolling of the statute against those so *proved but not sued* can hardly be denied". (emphasis added) (401 U.S. at 335) This construction, declared the Court, "materially furthers congressional policy by permitting private litigants to await the outcome of Government suits and use the benefits therefrom". (401 U.S. at 336)

D. Greyhound's Remaining Arguments Lack Merit

The Court of Appeals held that since the ICC proceedings "were of a kind likely to produce benefits to Mt.

Hood as a plaintiff in a subsequent antitrust suit" (A. 133), the statute of limitations was properly tolled to effectuate congressional purpose as defined by the Court in *Minnesota Mining*. Greyhound disagrees with the Court of Appeals' decision because, it asserts, Mt. Hood did not derive any benefits from the government's participation in the ICC case. That Mt. Hood was likely to benefit from the government's efforts was plain. Those benefits were recognized by the Court of Appeals and included the government's "investigative and legal resources" which were "made available to fully develop the facts and the law favorable to the common position of the Government and Mt. Hood." (A. 133)

But that was not all. It was the government that obtained a permanent injunction for Mt. Hood *(Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1034 (N.D. Ill. 1970)) and its subsequent enforcement *(United States v. The Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973), *aff'd* 508 F.2d 529 (7th Cir. 1974))—thereby ensuring Mt. Hood's survival—and it was the government that helped Mt. Hood prove Greyhound's predatory behavior and thereby negate Greyhound's subsequent claim of antitrust immunity. The Court of Appeals recognized the importance of that benefit: "The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity." (A. 133) Those benefits were not of less importance to Mt. Hood merely because Mt. Hood and the government worked together to achieve them.[8]

[8]Greyhound's reliance upon a statement made by Mt. Hood's expert witness at the hearing on attorneys' fees is inapposite. Prior to trial, Mt. Hood sought by motion to have Greyhound collaterally estopped to relitigate the ICC's adverse findings. That motion was denied. Hence it was necessary to prove much of Greyhound's predatory conduct twice (once to the ICC and again to the jury). While that fact (that Mt. Hood had to prove Greyhound's conduct again) was relevant to the award of attorneys' fees, it should not determine whether congressional intent behind §16(i) would be served by tolling in this instance. Indeed, *Minnesota Mining, supra,* holds that §16(i) applies even though plaintiff does not get the "benefit" of collateral estoppel with respect to facts proven in the agency proceeding under §16(a) because the policies of §16(a) and §16(i) are different. Moreover, Greyhound contended to the trial court—in contrast to its contention here—that the government's participation ***"must have played a large part in bringing about a decision favorable to plaintiff."*** (R. 3233)

Greyhound contends that, in seeking to satisfy the congressional antitrust policy behind §16(i), the Court of Appeals' decision failed to satisfy the "congressional purpose of certainty and predictability" reflected in the 1955 amendment to the Clayton Act. But there is nothing about the lower court's decision that is uncertain or unpredictable or antithetical to congressional purpose. Adhering strictly to the "basic principles for the construction of [§16(i)]," *Leh v. General Petroleum Corp.*, 382 U.S. 54, 58 (1965), the Court of Appeals held simply this: If any government action is instituted for the purpose of preventing a violation of the antitrust laws, whether by intervention or joinder as a party to a pending court or agency proceeding or by commencement of a separate court or agency proceeding, the statute of limitations shall be tolled under §16(i) with respect to any claim that is based in whole or in part on any matter complained of in said proceeding. No antitrust plaintiff or defendant will have trouble understanding what the Court of Appeals held, just as no antitrust plaintiff or defendant should have trouble understanding the decisions in *Minnesota Mining, Leh* and *Zenith,* which the lower court followed.

Greyhound's reliance upon the 1955 amendment, if anything, proves too much. Insofar as Congress was concerned with "certainty and predictability," dealt with it by enacting a uniform statute of limitations. However, it left the tolling provision intact. If Congress thought it necessary to the achievement of even greater "certainty and predictability," it could have easily repealed or constricted §16(i). It could do so now. But Greyhound should not ask this Court to do that which Congress has not yet chosen to do. Congress obviously concluded that enactment of a uniform statute of limitations, without more, would fully satisfy the need for certainty.[9] Accordingly, this Court has in all decisions subsequent to the 1955 amendment followed "Congress' basic policy objectives" in enacting §16(i). *Minnesota Mining, supra* at 320.

Greyhound closes with its alarmist "floodgates" claim, i.e., that the Court of Appeals' decision will preserve "countless stale antitrust claims" which "everyone believed" were time-barred. What "everyone believed" is of course unknown but, most certainly, no floodgates will be thrown open by the Court of Appeals' decision. The lower court merely held that when the United States joins as a party to a pending ICC action for the avowed purpose of preventing antitrust violations, §16(i) is invoked. The facts of this case are *sui generis:* whether the statute might also be tolled whenever the Justice Department informally "participates" in other regulatory proceedings to "express its views" on various matters was not decided below and is not presented here.

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[9]See, 101 Cong.Rec. 5131 (1955) (remarks of Reps. Murray and Quigley), noted in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 557, n. 29 (1974).

The "ramifications" which Greyhound finds "alarming" are really just this: no more antitrust claims will be preserved by government intervention in a pending ICC case than would be preserved if the antitrust victim and the government, instead of jointly invoking the agency's primary jurisdiction as they did here, were to commence separate court actions that would clearly toll the statute but would also probably be stayed or dismissed under *Far East Conference v. United States,* 342 U.S. 570 (1952) and *United States Navigation Co. v. Cunard Steamship Co.,* 284 U.S. 473 (1932). It is not the Court of Appeals' decision but Greyhound's contention (were it accepted) that could stimulate more litigation, for denial of tolling would necessitate duplicative filings with both agency and court solely as a technical means of preserving antitrust claims against forfeiture.[10]

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[10]See *Crown Coat Front Co. v. United States,* 386 U.S. 503, 515 (1967), wherein the Court (tolling a limitations statute) disapproved such duplicative filings because "the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." Chief Justice Burger, in *Rosado v. Wyman,* 397 U.S. 397, 435 (1970) (dissenting) expressed his concern about the needless proliferation of lawsuits that results from duplicative filings before court and agency: "Finally, there is the very important consideration of judicial economy and the prevention of premature and unnecessary lawsuits, particularly at this time when the courts are overrun with litigants on every subject. If courts are permitted to consider the identical questions pending before [the agency] for its determination, inevitably they will hand down a large number of decisions that could have been mooted if only they had postponed deciding the issues until the administrative proceedings were completed."

II. THE EQUITABLE DOCTRINE OF TOLLING PROVIDES INDEPENDENT GROUNDS FOR AFFIRMANCE OF THE COURT OF APPEALS' DECISION

Immediately after Greyhound cancelled the joint through bus and broke connections with Mt. Hood's service, Mt. Hood commenced its ICC action for the purpose of preventing Greyhound from continuing practices which threatened the destruction of its business. Mt. Hood had no choice of forum. It had to go to the ICC (1) to obtain prospective relief which the ICC could grant by virtue of 15 U.S.C. §21 and 49 U.S.C. §5(10) but which a District Court could not grant by virtue of 15 U.S.C. §26 and (2) to obtain a preliminary determination from the ICC that Greyhound's conduct had not been approved and was not "necessary" to "hold, maintain and operate" its acquired carriers under §5(12) of the Interstate Commerce Act and was therefore subject to the antitrust laws. The ICC disapproved and enjoined Greyhound's predatory conduct as beyond its prior acquisition orders, contrary to numerous sworn representations previously made by Greyhound to obtain the ICC's approval, destructive of competition and contrary to the public interest. The Commission's first decision was rendered April 5, 1968. *Mt. Hood Stages, Inc.*, 104 MCC 449 (1968). Promptly thereafter, on July 5, 1968, Mt. Hood filed this action for damages. These facts provide additional support for the Court of Appeals' affirmance of the District Court's decision with respect to tolling.

Even if the United States had not intervened in Mt. Hood's ICC action on December 14, 1964, for the purpose of enforcing the antitrust laws so as to invoke §16(i), the statute of limitations was tolled when Mt. Hood filed its

petition with the ICC on October 7, 1964. Although the statute of limitations reflects a policy of repose, this policy is "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Central R. R. Co.*, 380 U.S. 424, 428 (1965). Tolling is an equitable doctrine, *Honda v. Clark*, 383 U.S. 484, 501 (1964), to be applied whenever necessary to prevent injustice. *Burnett, supra*, 380 U.S. at 428. This is such a case.

The decisions of this Court in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) declare that a statute of limitations may be tolled if important federal policies will be served without doing violence to the statute of limitations' policy of repose. Thus in *Telegraphers* the Court held that prior resort to a regulatory agency suspended the statute of limitations with respect to a subsequent court action because "[r]egrettable as the long delay has been, it has been caused by the exigencies of the contest, not by the neglect to proceed." (321 U.S. at 549) In *Burnett* a prior state court action that was dismissed for improper venue tolled the statute on a later federal claim because plaintiff had acted diligently (albeit mistakenly), defendant was given adequate notice of plaintiff's claim and tolling effectuated congressional purpose. In *American Pipe* an improper class action tolled the statute for all purported class members because tolling promoted the federal policy of "litigative

efficiency and economy" without frustrating the limitation statute's policy of repose. (414 U.S. at 556) While the statute was not tolled in *Johnson,* the Court explained that a statute is tolled if there is a "substantial body of relevant procedural law to guide the decision" and a "significant underlying federal policy that would have conflicted with a decision not to suspend" the statute.[11]

This basic principle of equitable tolling applies here. In deciding whether a statute of limitations should be tolled, the Court declared in *Burnett* that consideration must be given to "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." (380 U.S. at 427) It was precisely because of the "remedial scheme developed for the enforcement" of the antitrust laws against regulated carriers such as Greyhound that Mt. Hood's preliminary resort to the ICC was (1) essential to prevent the destruction of Mt. Hood's business by Greyhound and (2) a condition precedent to the maintenance of Mt. Hood's subsequent damage action in the trial court below.

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[11]Each of the factors which rendered *Burnett* and *American Pipe* inapplicable in *Johnson* render those cases applicable here: (1) *Johnson* did not involve a federal statute of limitations whereas Clayton Act §4B is involved here; (2) there was "no relevant body of federal procedural law to guide our decision" and there was "no conflicting federal policy to protect" in *Johnson.* As discussed *post,* important federal policies—substantive and procedural—were served by preserving Mt. Hood's damage claim; and (3) unlike *Johnson,* the same "allegations" and same "conduct" and same "issues" were presented to both the ICC and the District Court. (A. 111, 114, 133) Hence "the prior filing . . . operated to avoid the evil against which the statute of limitations was designed to protect." (421 U.S. at 467)

A. 15 U.S.C. §15 and §26 Constitute Part Of The "Remedial Scheme Developed For The Enforcement" Of The Antitrust Laws

Preservation of competition against predatory behavior of the kind proven here is a matter of compelling public interest and antitrust enforcement through private actions for injunctive relief and damages is an important means of achieving that end. Despite the congressional purpose expressed in 15 U.S.C. §26 to encourage private enforcement of the antitrust laws by allowing antitrust victims to obtain injunctive relief against predatory behavior, *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 131 (1969); *Vendo Co. v. Lektro-Vend Corp.,* ____ U.S. ____, 53 L.Ed.2d 1009 (1977), this remedy was unavailable to Mt. Hood. Section 26 prohibits an antitrust victim from obtaining such relief from a District Court against a carrier subject to the Interstate Commerce Act with respect to conduct that is subject to regulation by the ICC. The congressional purpose behind this restriction was stated by the Court in *Central Transfer Co. v. Terminal R. Assoc.,* 288 U.S. 469, 475 (1933): "Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission."

With the District Court's doors closed to Mt. Hood's prayer for injunctive relief, Mt. Hood had no choice but to seek the relief it needed from the ICC—and it promptly did so. Section 26 thus reflects not only a policy in favor of private enforcement of the antitrust laws but also provides a "remedial scheme developed for the enforcement of rights" under those laws against carriers subject to regulation by the ICC. Pursuant to that "remedial scheme",

the victim seeking to prevent antitrust violations must resort to the ICC "to preclude any interference" with the ICC's regulatory jurisdiction by the District Court. Mt. Hood heeded that "remedial scheme"; it would frustrate the congressional policies behind 15 U.S.C. §26 to declare a forfeiture of Mt. Hood's damage claim for having done so.

In 15 U.S.C. §15, Congress has expressed its belief that private damage actions also constitute an important part of the "remedial scheme developed for the enforcement of" the antitrust laws. This Court has frequently recognized that "treble damages . . . play an important role in penalizing wrongdoers and deterring wrongdoing," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977); See also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965) and that, consequently, the antitrust claimant's task should not be rendered unduly burdensome. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). Equitable tolling will serve that congressional intent, particularly in light of the important role that Mt. Hood's damage action played in complementing the injunctive remedy to achieve compliance with the antitrust laws. Circuit Judge Goodwin (sitting as trial judge by designation) observed:

> "In the first place, the litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient. Second, if proof outside the abundant proof in this record were needed, the collateral [ICC] cases strip away any pretense that Greyhound's conduct toward its competitors was simply the result of good-faith aggressive management. The costs to Greyhound of the prolonged litigation before the Commission apparently have been more than offset by the profits Greyhound has derived by flouting the Commission's cease-and-desist orders. If there was ever a case in which a private action for damages is demonstrably necessary to carry out national antitrust policy, this is it." (A. 89)

B. The Doctrine Of Primary Jurisdiction Constitutes Part Of The "Remedial Scheme" Developed To Accommodate The Interstate Commerce Act And The Antitrust Laws

Equitable tolling here is essential not only to "the remedial scheme" reflected in 15 U.S.C. §15 and §26 but also to the remedial scheme developed by this Court to avoid conflict between antitrust and regulatory standards—the doctrine of primary jurisdiction. That doctrine virtually mandated Mt. Hood's course of action. Mt. Hood had already—of necessity—resorted to the ICC for prospective relief. Once Mt. Hood had invoked the ICC's jurisdiction regarding Greyhound's destructive practices, it is virtually certain that a simultaneous court action concerning the same conduct would have been dismissed or stayed.

Mt. Hood acted in accordance with the doctrine of primary jurisdiction. That doctrine has been developed by this Court and lower federal courts to accommodate the exercise of the courts' general powers to the special powers granted by Congress to certain agencies. One of the main purposes of this doctrine is to allow the agency responsible

for administering a regulatory scheme to adjudicate particular matters under its regulatory standards and thereby avoid needless conflict between different statutes and the tribunals which administer them. The Court in *Marine Terminal v. Rederi Transatlantic*, 400 U.S. 62, 68 (1970) declared that it had

> "recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policies were to emerge. . . . The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed."

The doctrine of primary jurisdiction thus responds to legislative intent.[12] It serves as a means of timing the adjudication of cases in the courts so as to allow regulatory commissions to fulfill the role Congress designed for them. Mt. Hood acted in accordance with that doctrine; it would be inequitable to declare a forfeiture of its damage claim for having done so. Only by tolling the statute can this Court avoid such an unfair result. Confronted by a wall of precedent regarding primary jurisdiction, Mt. Hood had every reason to conclude that a District Court

[12]*See, United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 482-3 (1932): "The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body employed in administrative supervision." Indeed, it has been described as reflective of legislative intent by reason of Congress' tacit approval over the years. See Latta, *Primary Jurisdiction In Regulated Industries And The Antitrust Laws*, 30 Univ. of Cinn. L. Rev. 261, 287 (1961).

would have dismissed a simultaneous damage action in 1964 as premature so as to avoid a conflict with the ICC.[13]

In the face of Greyhound's persistent claims of antitrust immunity, the doctrine of primary jurisdiction applied with particular force here. The Court of Appeals recognized that the ICC's preliminary review of Greyhound's conduct proved essential to the establishment of Mt. Hood's later antitrust claim: "The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity." (A. 133) While *Ricci*

[13]This important federal doctrine has been invoked to dismiss or stay countless federal court actions pending referral to the agency charged with the primary responsibility for regulating the alleged conduct so as to coordinate the work of agency and court and accommodate the regulatory schemes which each administers. Those cases are too numerous to list here. For the Court's reference, Mt. Hood has set forth the principal decisions on primary jurisdiction in the Appendix. See especially, *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 481 (1932) ["a remedy *must* be sought from the commission *before* the jurisdiction of the courts could be invoked."]; *Far East Conference v. United States*, 342 U.S. 570, 574 (1952) [agency had "exclusive preliminary jurisdiction" of the matters plaintiff alleged]; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 220 (1966) [" the danger of . . . conflict could best be avoided by holding that one tribunal or the other has the *exclusive* right to make the initial factual determination".] (emphasis added) It is no answer for Greyhound to speculate that a court might have merely stayed rather than dismissed a simultaneous court action. When forced to go to the ICC 14 years ago to save its business from destruction by Greyhound, Mt. Hood had every reason to believe from the 60 years of precedent on primary jurisdiction that a simultaneous court action would have been dismissed as premature. Indeed in 1964 (when Mt. Hood had to act), the law of the Ninth Circuit mandated dismissal. Relying upon *Far East* and *Cunard*, the Court of Appeals for the Ninth Circuit in *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650, 663 (9th Cir. 1964) affirmed dismissal of plaintiff's antitrust case on similar facts and held the District Court "was without jurisdiction to proceed." Mt. Hood had every reason to believe that was governing law.

v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) did not involve a statutory antitrust exemption, the Court declared that prior resort to the agency "would be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regime." (409 U.S. at 307) Even the dissent, believing primary jurisdiction inapplicable because the agency could not confer immunity, recognized: "If the commission has been given the power to grant general immunity to antitrust violators, sound judicial administration would require consultation with it before proceeding with the antitrust suit." (409 U.S. at 313) Although holding a stay of the court action inappropriate in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), this Court indicated the result would be different if—as here—the defendant were asserting a statutory exemption. Referring to *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), *Nader* declared: ". . . this court dismissed an antitrust action because initial consideration by the agency had not been sought." (426 U.S. at 301) *See also, FMC v. Pacific Maritime Association*, ... U.S. ....., 46 U.S.L.W. 4169, 4172 (1978).

The doctrine of primary jurisdiction thus manifests a "positive preference" for preliminary resort to the ICC, a "preference" which this Court found absent in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975). Preliminary consideration of antitrust issues by the agency charged with supervising the antitrust defendant's conduct is favored, since it "serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust pro-

ceedings". *Gulf States Utilities Co. v. F.P.C.*, 411 U.S. 747 (1973). Tolling here will accomodate that preference.

C. The Statute Of Limitations' Policy Has Been Satisfied

Finally, the statute of limitations' policy of repose has been met. Mt. Hood has neither slumbered on its rights nor surprised Greyhound with stale claims. See, *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-9 (1943). Greyhound received ample notice of Mt. Hood's charge that Greyhound was engaged in predatory conduct which violated the antitrust laws. The Court of Appeals observed that Mt. Hood's "allegations" and Greyhound's "conduct" and the "issues" with respect thereto were all essentially the same in both proceedings (A. 111, 114, 133) and that "Antitrust issues were an appropriate part of the [ICC] proceedings." (A. 136) Greyhound acknowledged that "in its petition [to the ICC], plaintiff alleged substantially everything which is alleged in its complaint in this Court" (R. 94) and, further, that "the Justice Department intervened in the proceeding to assure the adequate consideration of antitrust issues." (R. 1374) The ICC also told Greyhound that it was applying the antitrust laws to Greyhound's conduct. (A. 136) Hence it is plain that the ICC action for injunctive relief and the later court action for damages were legally and factually similar enough "to avoid the evil against which the statute of limitations was designed to protect." *Johnson v. Railway Express Agency*, 421 U.S. 454, 467 (1975). *See also, Elkins v. Derby*, 12 Cal.3d 410, 417-8 (1974).

Nor did Mt. Hood lack diligence. Ninety days after Greyhound severed connections with Mt. Hood's service,

Mt. Hood went to the ICC for injunctive relief. Ninety days after the ICC rendered its first decision, Mt. Hood went to the federal court for restitution. Mt. Hood has been vigorously prosecuting both actions, in search of assistance from both forums, for the past fourteen years.

Certainly Mt. Hood acted no less reasonably than did plaintiff in *Burnett* or *American Pipe* or *Telegraphers* or *Zenith* or *Leh.* The statute was tolled in those cases for plaintiffs who either had committed some procedural error, such as filing in the wrong court or relying upon an improper class action, or who were passively awaiting the outcome of related government litigation. In contrast, Mt. Hood not only proceeded with diligence but also proceeded in accordance with the remedial scheme reflected in the Clayton Act and the federal doctrine of primary jurisdiction and in deference to this Court's rightful concern for judicial economy and orderly procedure. What the Court declared in *Burnett, supra,* 580 U.S. at 435, applies with equal force here: "Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 23, 1978.

(Appendices A and B Follow)

APPENDICES

Appendix A

STATUTES INVOLVED

Section 4 of the Clayton Act (15 U.S.C. §15):

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 11(a) of the Clayton Act (15 U.S.C. §21(a)):

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communciations Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: . . .

Section 16 of the Clayton Act (15 U.S.C. §26):

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any

court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Section 5(10) of the Interstate Commerce Act (49 U.S.C. §5(10)):

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (8), of this section, as it may deem necessary or appropriate.

Appendix B

PRINCIPAL DECISIONS OF THE SUPREME COURT WHEREIN A DISTRICT COURT ACTION WAS DISMISSED OR STAYED BECAUSE OF THE DOCTRINE OF PRIMARY JURISDICTION

Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426 (1907);

Morrisdale Coal Co. v. Pennsylvania Railroad Co., 230 U.S. 304 (1912);

Mitchell Coal & Coke Company v. Pennsylvania Railroad Company, 230 U.S. 247 (1913);

Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U.S. 138 (1914);

Northern Pacific Railway Company v. Solum, 247 U.S. 477 (1917);

Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285 (1922);

Keogh v. Chicago & Northwestern Railway Company, 260 U.S. 155 (1922);

United States Navigation Company v. Cunard Steamship Company, 284 U.S. 473 (1932);

St. Louis, Brownsville & Mexico Railway Company et al., v. Brownsville Navigation District, 304 U.S. 295 (1937);

General American Tank Car Corporation v. El Dorado Terminal Company, 308 U.S. 422 (1940);

Armour & Company v. Alton Railroad Company, 312 U.S. 195 (1941);

Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239 (1949);

Montana-Dakota Utilities Co. v. Northwestern Public Service Company, 341 U.S. 246 (1951);

Far East Conference v. United States, 342 U.S. 570 (1952);

United States v. Western Pacific Railroad Company, 352 U.S. 59 (1956);

Federal Maritime Board v. Isbrandtsen Company, 356 U.S. 481 (1958);

Southwestern Sugar & Molasses Co. v. River Terminals Corporation, 360 U.S. 411 (1959);

Pennsylvania Railroad Company v. United States, 363 U.S. 202 (1960);

Marine Engineers Beneficial Association v. Interlake Steamship Company, 370 U.S. 173 (1962);

Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962);

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